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2019 JUL 15 PM 4:14
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For purposes of this response, the State adopts the Defense factual summary giving rise to the criminal charges. The State stipulates to the facts regarding staff in the County Attorney's Office. Additionally, no staff member of the County Attorney's Office, aside from the County Attorney, has digital access to both all criminal and all civil files. All staff have physical access to paper files, but the material contained in the paper files consists only of court paperwork (public

1 documents), discovery, and victim information. D.T.'s duties include work with tax appeals,
2 adoptions, and public records requests. She has no involvement in criminal matters. Civil
3 department legal secretaries do not assist prosecutors in any way.

4 D.L. is a listed victim only in Counts 6-9. The remaining counts have no relation to D.L.
5 As the listed victim, D.L. is entitled to access to the court paperwork, discovery, and his own
6 victim information.

7 8 Law and Argument

9 Motions for disqualification of opposing counsel based upon conflict or appearance of
10 impropriety are greatly disfavored. *Gomez v. Superior Court In and For Pinal County*, 149 Ariz.
11 223 (1986 *en banc*) ("We also view with suspicion motions by opposing counsel to disqualify a
12 party's attorney based upon conflict of interest or appearance of impropriety...") A criminal
13 defendant has very limited standing to bring a motion for disqualification. *State ex rel. Romley v.*
14 *Superior Court In and For County of Maricopa*, 181 Ariz. 378, 380 (Ariz.App. 1995) ("Generally,
15 only a client or a former client has standing to challenge legal representation on grounds of conflict
16 of interest.")

17 Appellate courts have found a conflict of interest when a prosecutor previously had
18 established an attorney-client relationship with the defendant. *State v. Latigue*, 108 Ariz. 521
19 (1972); *Turbin v. Superior Court In and For County of Navajo*, 165 Ariz. 195 (Ariz.App. 1990).
20 However, where no attorney-client relationship was created, the courts have held that the
21 prosecution should not be disqualified. *State v. McClellan*, 125 Ariz. 595 (Ariz.App. 1980)
22 (holding that the county attorney's office should not be disqualified even if a deputy county
23 attorney would be a witness for the defense); *State v. Lucas*, 123 Ariz. 39 (Ariz.App. 1979)
24 (holding that the county attorney's office should not be disqualified even if the office was
25 simultaneously prosecuting a defendant and defending the county in a civil rights law suit filed by
26 the defendant); *Romley*, 181 Ariz. 378 (Ariz.App. 1995) (holding that the county attorney's office
27 should not be disqualified even if the office was simultaneously prosecuting a defendant who was a
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1 victim in another case). Essentially, "where the conflict is so remote that there is insufficient
2 appearance of wrongdoing, disqualification is not required." *Gomez*, 149 Ariz. at 225.

3 In *Alexander v. Superior Court*, 141 Ariz. 157 (1984), the Supreme Court discussed a
4 motion for disqualification of opposing counsel. The case did not involve criminal law and did not
5 address the qualification of a prosecutor or prosecuting agency to handle a particular matter. The
6 Court noted that "only in extreme circumstances should a party to a lawsuit be allowed to interfere
7 with the attorney-client relationship of his opponent," and that "the burden should be upon the
8 moving party to show sufficient reason why an attorney should be disqualified from representing
9 his client." *Id.* at 161. The Court established four criteria on which a trial court should base its
10 decision: 1) whether the motion is being made for the purpose of harassing the [non-moving party];
11 2) whether the party bringing the motion will be damaged in some way if the motion is not granted;
12 3) whether there are any alternative solutions; and 4) whether the possibility of public suspicion
13 will outweigh any benefits that might accrue due to continued representation. *Id.* at 166.

14 In the context of whether or not a prosecutor or prosecuting agency should be disqualified,
15 the Court of Appeals added an additional factor, "the trial court should consider not only the
16 requirements set forth in *Alexander*, but also any showing of prejudice or lack of it." *Turbin*, 165
17 Ariz. at 199. Additionally, the court should consider "the severity of the charges, the complexity of
18 the case against the defendant, the number of lawyers in the prosecutor's office, the role that the
19 deputy county attorney had both with the defendant before the prosecution and thereafter, and the
20 role that the deputy county attorney had both with the defendant before the prosecution and
21 thereafter, and how deeply the prosecutor was involved in the prior and present prosecution." *State*
22 *ex rel. Romley v. Gottsfield*, 171 Ariz. 195, 197 (Ariz.App. 1992). *Gottsfield* reiterates the concept
23 that a defendant only has standing to challenge who is prosecuting him if the prosecutor had
24 previously established an attorney-client relationship.

25 In *State ex rel. Romley v. Superior Court In and For Maricopa County*, 181 Ariz. 378
26 (Ariz.App. 1995), the Court of Appeals held that there was no conflict or "appearance of
27 impropriety" for the Maricopa County Attorney's Office to simultaneously handle a case in which
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1 an individual was a victim in one case and a defendant in another. Although the prosecutor is
2 tasked with enforcing victim rights, "the rule is well established that a prosecutor does not
3 'represent' the victim in a criminal trial; therefore, the victim is not a client of the prosecutor." *Id.*
4 at 382. Moreover, "the prosecutor has no incentive to induce the victim...to 'please' the prosecutor
5 in a way that would prejudice defendants' rights to a fair trial." *Id.* There is no "appearance of
6 impropriety" for the prosecutor to advocate on behalf of the victim.

7 The Defense reference to *Latigue* is a gross misapplication of the concept of
8 prosecutorial disqualification to the case at bar. In *Latigue*, the defendant's attorney became the
9 Chief Deputy County Attorney for the Maricopa County Attorney's Office. The Chief Deputy
10 had established an attorney-client relationship with the defendant and received confidential
11 communication from the defendant. Although the Chief Deputy was not personally involved in
12 the prosecution of the defendant, the Court found that because of his supervisory authority,
13 there was still too great of a conflict.

14 The Defense requests that this Court fashion a remedy similar to *Turbin*, in which the
15 entire prosecutor's office was disqualified because the conflicted attorney had extensive
16 involvement with the defendant. In that case, disqualification was appropriate because the
17 prosecutor had developed an attorney-client relationship with the defendant. Here, that is not
18 the case.

19 In this case, no one in the Cochise County Attorney's Office established an attorney-
20 client relationship with the Defendant. The alleged "appearance of impropriety" arises because
21 a support staff member in the civil department has a child in common with a law enforcement
22 victim. DL is not a client of the County Attorney's Office. He is no different than any other
23 victim. The County Attorney's Office routinely deals with victims of traumatic events and law
24 enforcement victims and is not disqualified. The Defense cannot show why things would
25 suddenly be different in this case. Although it is true that cases are routinely discussed within
26 the office, DT is not a part of those discussions because she is not a part of the criminal
27 division. Undersigned counsel avows that he has never even met DT. Moreover, her access to
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1 information about this case is no greater than that of the victim, DL.

2 This Court should evaluate the factors discussed in *Alexander* and *Gottsfield*. Critically
3 missing is any relationship between the prosecutor and the Defendant. The case law establishes
4 that only if there is a relationship with the *defendant* does a conflict arise. In *Turbin*, the Court
5 held that should also account for any prejudice or lack thereof. When a prosecutor previously
6 developed an attorney-client relationship with a defendant, there is clear prejudice, as that
7 prosecutor may be privy to confidential information. However, in this case the Defense cannot
8 articulate the prejudice in having the Cochise County Attorney's Office conduct the
9 prosecution.

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11 **Conclusion**

12 Absent a prior attorney-client relationship, there is no conflict nor is there an appearance
13 of impropriety in this case. The Defense Motion should be denied.

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19 RESPECTFULLY SUBMITTED this 15th day of July, 2019.

20
21 COCHISE COUNTY ATTORNEY

22
23 By: 

24 MICHAEL A. POWELL
25 Deputy County Attorney
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